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IN THE

Supreme Court of the United States

October Term, 1984

STATE OF NEW YORK,

Petitioner,

against

ALFIO FERRO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Questions Presented

1. Whether the court below properly held that the mere placement of the furs in front of the respondent's cell was, in and of itself, the functional equivalent of questioning so as to constitute an interrogation under *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

2. Whether the court below properly held that *Michigan* v. *Mosley*, 423 U.S. 96 (1975) created a *per se* rule that a fresh set of *Miranda* warnings must be given as a prerequisite to the resumption of questioning.

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Opinion Below

The opinion of the Court of Appeals of the State of New York, not yet reported, appears in the appendix hereto (pp. 15a-21a).

Jurisdiction

The decision of the Court of Appeals of the State of New York was entered on October 25, 1984. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Constitutional Provisions Involved

Fifth Amendment

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

Fourteenth Amendment

Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Statement of Facts

Introduction

On December 5, 1975, Lillian Sher was murdered in her home during the course of a robbery in which some furs were stolen. The respondent was arrested for the crime a week later. At the stationhouse, the respondent declined to answer any questions after he had received the *Miranda* warnings. He thereafter requested to speak to a district attorney, and was told that he would have to first tell the police what he wanted to say. The respondent, however, said nothing further at this time. One of the arresting officers subsequently retrieved the stolen furs from the apartment of an accomplice and brought them to the stationhouse, where he placed them in front of the respondent's detention cell. The police did not say anything or attempt to engage the respondent in conversation. At this time, the respondent renewed his request to speak to a district attorney. When informed that the district attorney would not be able to do anything for him, the respondent asked

for a "pisano". He was then permitted to talk to an Italian detective, to whom he made statements which were used agianst him at his state trial.

Upon a motion to suppress the statements made to the detective, a *Huntley* hearing was held, after which the motion was denied. The respondent was subsequently convicted, after trial, of murder in the second degree and was sentenced to a term of imprisonment of 15 years to life.

The respondent's appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, was affirmed, with opinion, by a 3 to 2 decision. On appeal, by leave to the Court of Appeals of the State of New York, the order of the Appellate Division, Second Judicial Department, was reversed by a 5 to 1 decision.

The Evidence

The respondent was arrested in front of his furniture store a week after the homicide by Detectives **Arnold Hendricks** and **Robert Hudson**. As he was being taken to the police car, the respondent asked for what he was being arrested. Hudson replied, "Don't make any problems, don't talk just get into the radio car. You are locked up for murder". After the respondent had been transported to the stationhouse, he was given his *Miranda* rights. When asked whether he wanted to answer any questions without an attorney, the respondent replied negatively. The interrogation ended immediately. About four and a half hours later, at approximately 7:30 p.m., the respondent asked to speak to a district attorney. Detective Hudson in-

formed the respondent that he would first have to tell him what he wanted to say. When the respondent repeated his request Hudson replied, "You have to tell me what you want to talk to him about so I can relate that to him. Otherwise, he won't come". The repondent said nothing further at this time. Later that evening, Hudson retrieved the stolen furs from the apartment of the respondent's accomplice, Thomas Lewis. Returning to the stationhouse at approximately 9:45 p.m., Hudson placed the furs in front of the cell the respondent was being detained in. At this time, the respondent repeated his earlier request to speak to a district attorney. Detective Hudson again informed the respondent that he first had to tell him what he wanted to say. In response, the respondent promised to tell the police anything they wanted to know so long as the district attorney would do something for him. Hudson, however, did not take any statements from the respondent. Instead, he told him that neither he nor the district attorney would be able to do anything for him. The respondent nevertheless asked to speak to a "pisano". In acordance with this request Detective **Walter Cassi**, who was not assigned to the case, took the respondent into an empty room, where he informed him that he was an Italian. When the respondent said, "I can't afford to do a lot of time. What can I tell you?", Cassi, rather than extracting a statement from the respondent, simply told him that he would not be able to make any promises but would relate anything he told him to the district attorney "and whatever they do that's their business". After a period of silence the respondent, in narrative form, recounted that he had been told by the decedent's next-door neighbor that decedent was giving her a lot

of trouble for which she wanted the decedent robbed as a means of revenge; that he had told the neighbor he was not interested; and that in response to her question whether he could get somebody to commit the robbery, had responded only that he would think about it. Upon completing his narration, the respondent again said that he could not afford to do a lot of time.

On March 28, 1977, immediately prior to the selection of the jury, the trial judge denied the respondent's motion to suppress the statement made to Detective Cassi. The statement was used at trial, and the respondent was convicted of felony murder in the second degree.

The Appeal to the Appellate Division

Upon appeal to the Appellate Division of State Supreme Court, Second Ju icial Department, the respondent contended that the placement of the furs in front of his cell amounted to the functional equivalent of questioning within the intendment of *Rhode Island* v. *Innis*, 446 U.S. 291 (1980) and, as this took place after he had invoked his Fifth and Fourteenth Amendment rights to remain silent following the administering of the *Miranda* warnings, the respondent further argued that his right to cut off questioning under *Michigan* v. *Mosley*, 423 U.S. 96 (1975) had not been scrupulously honored. By a 3 to 2 vote, the Appellate Division affirmed the trial court's order denying suppression. In its opinion, the majority reasoned as follows [*People* v. *Ferro*, 92 A.D.2d 298, 303-04 (2d Dept. 1983)]:

> As Ferro already realized, only the testimony of Lewis or Feliciano could connect him to the furs, and their testimony could condemn him even without the furs.

The isolated viewing of the furs therefore constituted no more than an innocuous translation of the obvious into concrete terms. The subsequent inculpatory statements to Cassi, a detective completely unconnected with the case, must thus be viewed as the self-serving efforts of an aging criminal to spare himself the remainder of his life in captivity, and not the result of psychological coercion or police behavior reasonably likely to elicit an incriminating response. Our conclusion is bolstered by Ferro's compulsion to proceed with his story despite the police refusal to offer him a deal, and by the fact that Ferro was permitted to terminate his story at a point where he characterized his conduct as innocent in nature. Police anxious to obtain a confession in disregard of a defendant's *Miranda* rights simply do not proceed in such a manner. We further note that Ferro was not an easily awed or intimidated novice in the criminal justice system.

The Appeal to the New York Court of Appeals

On appeal, by permission of one of the dissenting justices at the Appellate Division, to the New York Court of Appeals, the respondent raised the same arguments as those which had been presented to the Appellate Division. By a 5 to 1 vote, the Court of Appeals reversed the order of the Appellate Division. In an opinion, the majority held that the placement of the furs in front of the respondent's detention cell constituted an interrogation under *Rhode Island* v. *Innis,* 446 U.S. 291, since an objective observer with the same knowledge concerning the respondent as the police had would have concluded that the conduct of the police was reasonably likely to elicit a response. The majority further held that in view of the absence of a fresh set of *Miranda* warnings the respondent's right to cut off ques-

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tioning was not scrupulously honored. The full texts of the majority and dissenting opinions appear in the appendix hereto (pp. 15a-29a).

Reasons for Granting the Writ

Introduction

The petitioner argues the following reasons why this petition for writ of *certiorari* should be granted:

1. The decision of the New York Court of Appeals rests solely upon the Constitution of the United States.

2. The issue of whether the mere placement of physical evidence in front of a person accused of committing a crime without any accompanying words, acts, or other conduct, constitutes the functional equivalent of an interrogation under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), is an extremely substantial federal question which the Court has never decided. We submit that the position of the New York Court of Appeals on this issue conflicts with the spirit of *Rhode Island* v. *Innis*, 446 U.S. 291 (1980), and interprets the "likely to elicit" test too literally and mechanically.

3. The question of whether the Courts decision in *Michigan* v. *Mosley*, 423 U.S. 96 (1975), created an inflexible *per se* rule mandating the administering of a fresh set of *Miranda* warnings before questioning can be resumed is also a very substantial federal question which has never been decided by the Court. We submit that the New York Court of Appeals misapplied *Mosley* and created an unjustified *per se* rule.

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POINT ONE

The decision rests solely upon the Constitution of the United States.

There are no valid, independent state grounds for the decision reached by the New York Court of Appeals. Therefore, the doctrine expressed in *Jankovich* v. *Toll Road Commission,* 379 U.S. 487 (1965), is not applicable. Further, there is no need to remand this case to the New York Court of Appeals for clarification of its opinion [*Ohio* v. *Gallagher,* 425 U.S. 257 (1976)]. In defining interrogation as "whether an objective observer with the same knowledge concerning the suspect as the police had would conclude that the remark or conduct of the police was reasonably likely to elicit a response", and holding that the police, by placing the furs in front of the respondent's cell without giving a new set of warnings, failed to scrupulously honor the respondent's right to cut off questioning, the New York Court of Appeals was clearly basing its decision upon its interpretation of the Fifth Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment. The New York Court of Appeals revealed the federal basis for its decision by interpreting *Rhode Island* v. *Innis, supra,* and *Michigan* v. *Mosley, supra.*

As the decision did not rest on the New York Constitution or state law but, instead, entirely upon an interpretation of federal constitutional law, the Court has jurisdiction to entertain this matter.

POINT TWO

The court below improperly found that the mere placement of the furs in front of the respondent's cell was, in and of itself, the functional equivalent of questioning so as to constitute an interrogation under *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

The evidence at the suppression hearing established that Detective Hudson placed the furs in front of the respondent's cell without saying or doing anything further. The New York Court of Appeals nevertheless held that the placement of the furs next to the respondent constituted interrogation under *Miranda*. In so holding, the court below misinterpreted *Rhode Island* v. *Innis*, 446 U.S. 291 (1980), and applied the "likely to elicit" test enunciated in that decision too literally and mechanically. We submit that *Rhode Island* v. *Innis, supra,* was never intended to apply to situations such as those found in this case where the sole conduct challenged is the placement of evidence next to defendants. Although the placement of the furs in front of the respondent's cell might be labelled a "subtle compulsion" [see *Rhode Island* v. *Innis, supra,* at 303], the Court in *Innis* rejected the notion that any "prompting" of a person in custody is somehow evil *per se* [see *Edwards* v. *Arizona*, 451 U.S. 477, 487-88 (1981), Burger, Ch. J., concurring].

The Court has never decided whether the mere placing of evidence in front of a defendant should be deemed the functional equivalent of questioning under *Miranda*. The validity of the practice of displaying physical evidence to defendants has been sanctioned by a number of federal

and state appellate courts, who have refused to regard such practices as interrogations in violation of asserted *Miranda* rights [see *United States* v. *Criswell,* 696 F.2d 636, 639 (8th Cir. 1983); *United States* v. *Davis,* 527 F.2d 1110, 1111 (9th Cir. 1975), *cert. denied* 425 U.S. 953; *United States* v. *Boston,* 508 F.2d 1171, 1174-75 (2nd Cir. 1974), *cert. denied* 421 U.S. 1001; *Vines* v. *State,* 402 A.2d 900 (Md. Ct. of Appeals 1979); *State* v. *Burnett,* 429 S.W.2d 239, 242, 243 (Mo. Sup. Ct. 1968)]. We submit that the Court should clarify the validity of this practice. Indeed, the need for clarification is highlighted by this case. The dissent emphasized its strong belief that the majority was interpreting the "likely to elicit" test set forth in *Rhode Island* v. *Innis, supra,* too literally and mechanically (p. 22a). The majority, on the other hand, in rejecting the dissenter's interpretation noted, in a footnote, as follows (p. 21a):

> The dissent's interpretation of *Innis* implies that the Supreme Court did not mean what it held in that case. We should not indulge in such speculation, particularly since *Innis* was decided but a few years ago.

By granting the petition for a writ of *certiorari,* the Court would have the opportunity of explicitly determining the issue of whether its decision in *Rhode Island* v. *Innis, supra,* was meant to apply to the factual setting present in this case.

POINT THREE

The court below improperly held that *Michigan* v. *Mosley*, 423 U.S. 96 (1975) created a *per se* rule that a fresh set of *Miranda* warnings must be given as a prerequisite to the resumption of questioning.

Assuming, *arguendo*, that the placement of the furs in front of the respondent's detention cell constituted the functional equivalent of questioning, the New York Court of Appeals misinterpreted *Michigan* v. *Mosley*, 423 U.S. 96 (1975), by holding that a new set of *Miranda* warnings had to be given before questioning could be resumed (pp. 15a-16a).

In *Michigan* v. *Mosley*, *supra*, the Court held that an accused can be interrogated even after he has been given his *Miranda* rights and has invoked his constitutional right to remain silent, so long as his right to cut off questioning was scrupulously honored. In determining that this right had been scrupulously honored the Court cited several factors in support of its decision, one of which was the administering of a fresh set of *Miranda* warnings to Mosley prior to the resumption of questioning [*id.*, at 105-06]. However, there were other factors which also supported the decision, and the Court never held that a fresh set of warnings was a prerequisite to the resumption of questioning. The New York Court of Appeals, however, by holding that the placement of the furs in front of the respondent's cell constituted interrogation which was impermissible "because no new *Miranda* warnings were administered" (p. 16a) misapplied *Mosley* and created an unjustified *per se* rule. As the Court never held that a new set of warn-

ings was indispensible to the resumption of interrogation, regardless of the length of the interval between the initial and second set of questioning, we submit that the Court should clarify *Mosley* by explicitly holding that additional warnings are not constitutionally required to scrupulously honor a person's right to cut off questioning.

This case illustrates that a *per se* rule would lead to absurd and unintended results. The respondent, after initially invoking his right to remain silent, expressed a desire to break his silence when he requested to speak to a district attorney. This decision by the respondent was not coerced or induced in any manner by the police. Then, nearly seven hours after the respondent had first invoked his right to remain silent, the furs were placed in front of his cell. Even assuming that this act constituted the functional equivalent of an interrogation, this so-called resumption of questioning occurred only after the passage of a significant period of time. Indeed, the interval in this case was far longer than that found in *Michigan* v. *Mosley, supra,* at 104, 106 (an interval of more than two hours held to constitute a significant period of time). Further, the police did not persist in repeated efforts to wear down the respondent's resistance and make him change his mind [*Michigan* v. *Mosley, supra,* at 105-06]. In view of these facts, it is clear that the respondent's choice to make his narrative statement to Detective Cassi was a free one and an intelligent exercise of his judgment. Hence, there was no need or necessity to administer a fresh set of *Miranda* warnings in this case. Clearly, this case illustrates that the *per se* rule created by the New York Court of Appeals not only serves no useful purpose but yields absurd and unintended results

which would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activities.

As the Court has never held that a fresh set of *Miranda* warnings is a constitutional requirement to the resumption of questioning, and as the New York Court of Appeals has misinterpreted *Mosley* by creating an unjustified *per se* rule mandating new warnings, the Court should clarify its holding in *Mosley* by ruling that the United States Constitution does not require the inflexible rule created by the court below.

Conclusion

For the reasons stated above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

JOHN J. SANTUCCI
District Attorney
Queens County

WILLIAM SCHRAGER
Assistant District Attorney
Of Counsel

APPENDICES

Opinion of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

v.

ALFIO FERRO,
Appellant.

Second Department, March 21, 1983

SUMMARY

APPEAL from a judgment of the Supreme Court (GEORGE BALBACH, J.), rendered May 25, 1977 in Queens County upon a verdict convicting defendant of murder in the second degree.

HEADNOTE

Crimes—Confession—Inculpatory Statements by Defendant—Voluntariness

The fact that a suspect views or learns of potential physical or other evidence against him does not lead to the inexorable conclusion that said viewing constitutes subtle coercion or the functional equivalent of questioning nor does the fact that a statement is made because a suspect learns that the incriminating content of the statement will

be discovered in any event mean that the statement is made as a result of compelling influences and not spontaneously. Accordingly, where defendant was arrested for murder after the death of a victim of a burglary and, subsequent to the invocation of his *Miranda* rights, made inculpatory statements following the placement outside his cell by a police officer of a bundle of furs which had been stolen from the victim's home, said statements cannot be viewed as the result of psychological coercion or police behavior reasonably likely to elicit an incriminating response in violation of defendant's *Miranda* rights; defendant realized that only the testimony of his accomplices could connect him to the furs and that their testimony could condemn him even without the furs, thus rendering the isolated viewing of the furs no more than an innocuous translation of the obvious into concrete terms.

APPEARANCES OF COUNSEL

Anthony V. Lombardino for appellant.

John J. Santucci, District Attorney (*William Schrager* of counsel), for respondent.

OPINION OF THE COURT

THOMPSON, J.

Lillian Sher, an elderly woman living alone in her one-family attachel house in Forest Hills, was confronted by burglars who entered her abode on December 5, 1975 to take her property. The invaders vacated the residence only after subduing their innocent victim and looting the premises. Her lifeless body, bound hand and foot, was not discovered until December 11. The piece of cloth stuffed into her mouth to stifle any potential cries for help also cut off her oxygen supply and caused her asphyxiation.

Alfio Ferro, the 58-year-old proprietor of a used furniture store in Manhattan, with no obvious connection to Sher, was arrested by Detective Robert Hudson on December 12 in front of his store and was informed his arrest was for murder. Arrested along with Ferro was Thomas Lewis, Ferro's employee. Lewis had a substantial criminal record, and Ferro had been arrested in both August, 1975 and November, 1975 for criminal possession of stolen property. Detective Hudson told Ferro to keep quiet and not make any statements. Transported back to the 106th Precinct along with Ferro and Lewis was Wanda Feliciano, a 17-year-old employee of Ferro's. Feliciano was an admitted lesbian who conceded during her trial testimony that at one time she had swallowed one quarter of a bottle of ammonia, and several days later had been taken to the hospital after consuming six Tuinals. She also acknowledged other drug usage. Detective Hudson and his group arrived at the precinct at about 3:00 P.M.

When Ferro was brought to the precinct, Detective Arnold Hendricks identified himself to Ferro and informed

Ferro that he had been arrested for the Sher homicide. Hendricks gave Ferro his *Miranda* rights and Ferro stated that he understood them. When Ferro was asked if he was willing to answer questions without an attorney being present, his response was "No". Ferro did not ask for an attorney. He was then placed in a detention cell.

After spending approximately four and one-half hours in the cell, an ample amount of time to reflect upon his situation, Ferro spontaneously asked Detective Hudson at about 7:30 P.M., "Can I speak to a D.A.?" Hudson informed him that the District Attorney had left and would have to be summoned to return. When asked what he wanted to say to the District Attorney, Ferro simply repeated his desire to speak to a District Attorney. Hudson explained that Ferro would have to tell him what he wanted to talk to the District Attorney about so the District Attorney could be advised, and that he would not come without this. In response to this Ferro "didn't say anything".

Detectives Hudson and Hendricks returned with Thomas Lewis to Lewis' apartment in Manhattan at about 8:30 P.M., and Lewis surrendered furs that had been stolen during the burglary. Upon their return to the precinct at approximately 9:45 P.M., Hendricks put the furs down in front of Ferro's cell, "a foot away from him", after which he took Lewis to another area of the precinct. Hendricks candidly conceded that he did this "[f]or him to tell what happened".

At this point Ferro grabbed the mesh of the cell with both hands and told Hudson "I have to talk to a D.A.". Hudson again told him that a District Attorney would not come unless Ferro told him why he wanted him. Ferro responded "I will tell you guys what you want to know if

the D.A. can do something for me". Hudson informed Ferro that neither he nor a District Attorney could do anything for him, at which point Ferro expressed his desire to speak to a "Pisano".

Detective Walter Cassi, who was not working on the Sher case, was told that Ferro wanted to speak to a "Pisano". Cassi identified himself to Ferro as an Italian, and when Ferro expressed a desire to speak with him, Cassi took him to a separate room. Ferro then stated "I can't afford to do a lot of time. What can I tell you?" Cassi instructed him that he would forward Ferro's information to the District Attorney, but what the District Attorney did was his business and no promises could be made. Ferro then stated that he had been introduced to Florence Freeman, who lived next to Sher, by a woman named Irish. Freeman complained to him that Sher had been giving her trouble and had once grabbed her by the neck. Claiming that Sher was "a nut and dirty", she expressed a desire to have Sher robbed. When Ferro told Freeman that he was not interested, she asked him if he could get anybody else and he told her he would think about it. When Cassi told Ferro that he had not told him anything relative to the investigation, Ferro told him "I just can't do a lot of time". At this point the interview terminated, and Ferro was taken to central booking about 10:00 P.M.

Following the denial of Ferro's motion to suppress the statements he made subsequent to viewing the furs, the matter proceeded to trial. The most damning testimony came from Wanda Feliciano who testified to Ferro's presence at the scene at the time of the commission of the crime and to admissions made to her by Ferro. Following a

lengthy, hotly contested trial, Ferro was convicted of felony murder.

On appeal Ferro posits a plethora of potential errors that warrant a new trial, but only one merits discussion. He argues that the placement of the furs in front of the cell constituted either a subtle form of psychological coersion or, in the alternative, the functional equivalent of ques- or, in the alternative, the functional equivalent of questioning in disregard of his invocation of his *Miranda* rights. He asserts that the faliure to suppress the ensuing statements constituted reversible error. For the reasons stated herein we do not agree, and affirm the judgment of conviction.

In *Rhode Island v Innis* (446 US 291, 300) the Supreme Court noted that " '[i]nterrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." The court further refined the concept of interrogation as follows (p 301): "That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation."

In *Michigan v Mosley* (423 US 96), the Supreme Court also discussed the role played by the *Miranda* safeguards in counteracting the coercive pressure inherent in the custodial setting. The critical *Miranda* safeguard provides the defendant with the right to cut off questioning, thereby enabling him to control the timing of the questioning, its duration, and the subjects to be discussed (see, also, *People v Grant*, 45 NY2d 366). The instant appeal must be analyzed within the foregoing context.

We note at the outset that if the intent of the police was dispositive, Detective Hendricks' concession that he put the furs in front of Ferro to elicit a response would mandate a reversal. Although this testimony is still somewhat probative as to whether the police should have known that this act was reasonably likely to elicit an incriminating response, the totality of the circumstances must be considered. Just as police good faith is not an acceptable excuse negating a violation of a defendant's *Miranda* rights, their dubious motivations herein cannot pre-empt this court from objectively evaluating whether their actions were reasonably likely to elicit an incriminating response.

The fact that a suspect views or learns of potential physical or other evidence against him does not lead to the inexorable conclusion that said viewing constituted subtle coercion or the functional equivalent of questioning (see *State v Grisby*, 97 Wn 2d 493; *People v Prator*, 93 Misc 2d 303). Were the rule otherwise, a unique and newly imposed burden would be saddled upon the police to shield a defendant from learning of any aspect of the case against him once he invokes his *Miranda* rights or before the *Miranda* rights are given and waived. So onerous and exacting a burden has not been demanded. Thus, in the case of *People*

v Baez (79 AD2d 608), where the defendant was approached by an undercover officer he had sold drugs to and blurted out an inculpatory statement upon realizing what he had done, the utterance was found to be spontaneous and not in violation of his *Miranda* rights.

The fact that a statement is made because a suspect learns that the incriminating content of the statement will be discovered in any event does not mean that the statement was made as a result of compelling influences and was not spontaneous (*People v Torres,* 21 NY2d 49). Furthermore, not every provocative statement made by the police in a defendant's presence which elicits an incriminating response will be found to be improper, where there is no course of questioning or an interrogational environment (*People v Bryant,* 87 AD2d 873).

Within the framework of the foregoing and the unusual facts presented herein, we conclude that Ferro's response to seeing the furs was not the product of the functional equivalent of questioning or phychological coercion. When Ferro was arrested a full week after the crime was committed, he had to be troubled by the strong possibility that only a breach of the cabal that knew what really happened could have led the police to him. One can only surmise the anxiety level permeating Ferro's thought processes as he was returned to Queens with Lewis and Feliciano, realizing that the continued silence of a suicidal, drug-using lesbian and a small-time thug was all that stood between him and his final, immutable linkage to the Sher murder. Ferro was told to remain silent as soon as he was arrested, and his invocation of his *Miranda* rights was scrupulously honored.

After sitting in the cell long enough to contemplate the bleak future of a 58 year old convicted of a callous murder, Ferro teetered on the very edge of confession at 7:30 P.M. when he asked to speak to a District Attorney. Even at this point the police did not press their advantage and apply the slight nudge necessary to push Ferro into making the cathartic and potentially self-serving statement he was abviously contemplating. The police did not rush out and get an Assistant District Attorney who might obtain a confession before Ferro invoked his right to an attorney.

Approximately two hours later, Ferro saw the furs. They were not recovered from Ferro, and nothing inherent in the objects linked Ferro to the crime. As Ferro already realized, only the testimony of Lewis or Feliciano could connect him to the furs, and their testimony could condemn him even without the furs. The isolated viewing of the furs therefore constituted no more than an innocuous translation of the obvious into concrete terms. The subsequent inculpatory statements to Cassi, a detective completely unconnected with the case, must thus be viewed as the self-serving efforts of an aging criminal to spare himself the remainder of his life in captivity, and not the result of psychological coercion or police behavior reasonably likely to elicit an incriminating response. Our conclusion is bolstered by Ferro's compulsion to proceed with his story despite the police refusal to offer him a deal, and by the fact that Ferro was permitted to terminate his story at a point where he characterized his conduct as innocent in nature. Police anxious to obtain a confession in disregard of a defendant's *Miranda* rights simply do not proceed in such a manner. We further note that Ferro was not an easily awed or intimidated novice in the criminal justice system.

In short, Ferro asks us to raise the concepts of psychological coercion and the functional equivalent of questioning to levels that are in no way necessary to fully afford the protections required by *Miranda v Arizona* (384 US 436). This we will not do. Accordingly, the judgment of conviction must be affirmed.

Lazer, J. P. (dissenting). The principal issue is whether the police action of placing the stolen furs in front of defendant's cell constituted the functional equivalent of interrogation. My colleagues conclude that the defendant's response on seeing the furs was not evoked by such interrogation. My disagreement stems from the fact that the defendant previously had invoked the right to remain silent; therefore—without reaching any issue as to the right to resume questioning—the failure to afford the *Miranda* warnings before the furs were placed requires suppression of the defendant's statement and a new trial. The issue is determined by evaluating the police conduct and not by speculative probing of the defendant's innermost psyche.

On December 12, 1975, Detective Robert Hudson arrested Alfio Ferro for murdering Lillian Sher while robbing her in her apartment. Ferro was brought to the 106th Precinct in Queens, heard his rights read, declared that he understood them, made no request for counsel but stated his unwillingness to answer questions. He was questioned no further.

Later in the day, while Ferro still was in a detention cell in the precinct's squad room, he asked Detective Hudson whether he could speak to the District Attorney. Hudson answered: "You have to tell me what you want to talk to him about so I can relate that to him. Otherwise, he won't come". Ferro resumed his silence.

That evening, after Mrs. Sher's furs had been recovered, another detective placed them a foot away from Ferro's cell. According to Hudson, who was then present, Ferro grabbed the mesh of the cell and said to him, "Hey, I got to talk to you" but when asked what it was he wanted to say, he responded: "I have to talk to a D.A..". Hudson told Ferro that "You have to tell me what you want or the D.A. won't come here; if you want to make a statement". Ferro then declared that he would "tell you guys what you want to know if the D.A. can do something for me". Hudson said that neither he nor the District Attorney could do anything for him.

Within 15 minutes after his conversation with Hudson, Ferro asked to speak with a "Pisano" which resulted in a conversation with Detective Walter Cassi at the cell. Cassi asked Ferro if he wanted to say something and upon receipt of an affirmative reply took him into an office where Ferro asserted that he could not afford to do a lot of time. He then related a discussion he had had with Sher's next door neighbor, Florence Freeman. The relations between Freeman and Sher had been troubled, and since Freeman thought Sher was wealthy, she wanted her robbed. Although Ferro professed lack of interest in a robbery, he told Freeman that he would think about finding someone to do it. Cassi informed Ferro that he had not said anything relative to the investigation and that he could not make any promises, to which Ferro reiterated that he could not do a lot of time and the conversation ended.

On this factual scenario, the Fifth Amendment is the only issue and it scarcely bears repetition to note that to safeguard the Fifth Amendment privilege against self incrimination, the warnings required under *Miranda v Ari-*

zona (384 US 436, 471) are "an absolute prerequisite to interrogation". Statements obtained by custodial interrogation or its functional equivalent, but not preceded by *Miranda* warnings, are not a true product of free choice and are per se inadmissible in evidence (see, generally, Note, Invocation of Miranda Rights: A Question of Fact? *Fare v Michael C.*, 21 BC L Rev 922). Custodial interrogation includes that which is psychologically oriented, and it is axiomatic that interrogation must cease if, in any manner, either prior to or during questioning, the individual indicates that he wishes to remain silent (*Miranda v Arizona, supra,* p 448). Any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise (*Miranda v Arizona, supra,* p 474).

In *Rhode Island v Innis* (446 US 291), the Supreme Court construed *Miranda* as applicable not only to express questioning but to the "functional equivalent" of questioning as well. Limiting the scope of *Miranda* to express questioning would (p 299, n 3) " 'place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda*' ". In addition to express questioning, interrogation was defined as including (*supra,* p 301) "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

The functional equivalent of questioning encompasses "any remarks, psychological tactics or patient maneuvering" employed to undermine the individual's will to resist

(*People v Faison*, 78 Ill App 3d 911, 913). Confronting an accused with incriminating evidence is a tactic frequently employed to induce a confession (*United States v Barnes*, 432 F2d 89; Kamisar, *Brewer v Williams, Massiah*, and *Miranda:* What is "Interrogation"?, When Does it Matter?, 67 Geo LJ 1). Here, the confrontation for the obvious purpose of getting the defendant to abandon his self-imposed silence was a flagrant violation of *Miranda* (*United States v Barnes, supra*, p 91). *People v Bodner* (75 AD2d 440, 443) is illustrative, for there, where defendant sought to inculpate his cousin as the arsonist, the police declaration to the defendant that the cousin's alibi had "checked out" was considered the equivalent of questioning and—since no warnings had been given—suppression was required. In *People v Lange* (77 AD2d 632, 633), an officer's comment in the charged atmosphere of the rescue of a rape defendant from an agitated crowd that it " 'was lucky [the defendant] didn't get killed' " was held to subject the defendant to " 'questioning or its functional equivalent' ". Other examples of the functional equivalent include the recitation of strong evidence against the suspect (*People v Grant*, 45 NY2d 366; *People v Pugh*, 70 AD2d 664), a conversation between police officers concerning defendant's ignorance of the brand name of a stolen television set "within earshot of defendant" (*People v Tirado*, 79 AD2d 907, 908), disclosure of polygraph test results to the suspect (*State v Godfrey*, 131 NJ Super 168), and a conversation regarding the death penalty as defendant's fate (*State v Emery*, 131 Ariz 493).

Notwithstanding the majority's focus on the defendant's psychological reactions to his plight, and even his thought processes and perceptions, the proper focus of the "functional equivalent of interrogation" standard relates to the

propriety of police conduct—"words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response" (*Rhode Island v Innis*, 446 US 291, 302, *supra*). The cases cited by the majority, *People v Prator* (93 Misc 2d 303) and *State v Grisby* (97 Wn 2d 493), involved apparently coincidental viewings of evidence by the defendant during administrative duties routinely being carried out. Here, however, there was no reason to place Mrs. Sher's furs in front of Ferro's jail cell except to break his silence or elicit an incriminating response. Moreover, since Detective Hendricks admitted that the tactic was designed to elicit an incriminating response, it is highly unlikely that "the practice will not also be one which the police should have known was reasonably likely to have that effect" (*Rhode Island v Innis, supra*, p 301, n 7). While the furs might legitimately have been used for interrogation had the defendant not invoked his right to remain silent, their use as a psychological weapon to overcome that silence or to evoke an incriminating statement, without a fresh set of warnings, was palpably improper (see *Michigan v Mosley*, 423 US 96; *People v Pugh, supra*, p 666).

Accordingly, I vote to reverse, grant the motion to suppress the statements in question, and order a new trial.

MANGANO and WEINSTEIN, JJ., concur with THOMPSON, J.; LAZER, J. P., dissents and votes to reverse the judgment, grant the defendant's motion to suppress and order a new trial, with an opinion, in which GIBBONS, J., concurs.

Judgment of the Supreme Court, Queens County, rendered May 25, 1977, affirmed.

Opinion of the Court of Appeals, State of New York

COURT OF APPEALS

STATE OF NEW YORK

2 No. 413

THE PEOPLE &C.,

Respondent,

v.

ALFIO FERRO,

Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

(413) Anthony V. Lombardino, Kew Gardens, for appellant.

John J. Santucci, DA, Queens County (William Schrager of counsel) for respondent.

MEYER, J.

What constitutes "interrogation" of a suspect who, after *Miranda* warnings, has declined to answer questions is determined not by the subjective intent of the police, but by whether an objective observer with the same knowledge concerning the suspect as the police had would conclude that the remark or conduct of the police was reasonably likely to elicit a response[1] Because applying that test we con-

1. Not involved in the present case and, therefore, not reached by us, is whether the same test applies when the police conduct is in furtherance of routine administrative duties (see *People* v *Prator* 93 Misc 2d 303; *State* v *Grisby*, 97 Wn2d 493; cf. *People* v *Bryant*, 59 NY2d 786).

clude that the conduct of the police in placing in front of the cell in which defendant was being detained furs stolen from the murder victim's residence constituted interrogation and because no new *Miranda* warnings were administered to defendant Ferro, his statements made subsequent to viewing the furs should have been suppressed. The order of the Appellate Division should, therefore, be reversed, defendant's motion to suppress those statements granted, and a new trial ordered.

I

On December 5, 1975, Lillian Sher was murdered in her home during the course of a robbery in which some furs were stolen. A week later, defendant Ferro was arrested for the murder and taken to the precinct station. After the reading of his *Miranda* rights to him, Ferro declined to answer any questions. Thereafter, while being held in a detention cell, he asked Detective Hudson whether he could speak to a district attorney. Told by Hudson that, "You have to tell me what you want to talk to him about so I can relate that to him. Otherwise, he won't come," defendant said nothing further. Hudson then left the precinct.

When he returned, Hudson and his partner brought with them the stolen furs, which they had obtained from the apartment of a co-defendant, Thomas Lewis. Without any verbal communication with defendant, the furs "were placed right in front of the cell a foot away from [Ferro]." Ferro then "grabbed ahold of the wire mesh with both hands and * * * said * * * 'Hey, I got to talk to you.' " He again told Hudson he wanted to speak to a district attorney, stating "I will tell you guys what you want to know if the

D.A. can do something for me." Hudson responded that neither he nor the district attorney could do anything for Ferro. Hudson testified that there was one continuous conversation, which began as soon as the furs were placed on the floor in front of the cell. Its culmination was Ferro's request to speak to an Italian detective.

Detective Walter Cassi was then asked to speak to defendant, and, approaching the detention cage, said "I am Italian. Do you want to say something." Receiving a positive response, Cassi took defendant into the commanding officer's room, where defendant said "I can't afford to do a lot of time. What can I tell you?" Told by Cassi that he could promise nothing, but would pass on whatever was said to the district attorney, "and whatever they do that's their business," Ferro recounted that he had been told by a woman who was decedent's next-door neighbor that decedent was giving her a great deal of trouble for which she wanted decedent robbed as a means of revenge, that he had told the neighbor he was not interested, and in response to her question whether he could get somebody to do so, had responded only that he would think about it. Neither before the furs were placed in front of the detention cell nor before Cassi began his conversation with defendant in the commanding officer's office were *Miranda* warnings repeated anew.

The hearing judge denied defendant's motion to suppress and after a jury trial defendant was found guilty of felony murder. On appeal to the Appellate Division, defendant raised nine points, only one of which—the admissibility of the statements made to Cassi—was deemed by that court to merit discussion. The judgment was affirmed, two Justices dissenting, the majority characterizing

the statements "as the self-serving efforts of an aging criminal to spare himself the remainder of his life in captivity, and not the result of psychological coercion or police behavior reasonably likely to elicit an incriminating response." The case is before us by leave of one of the dissenting Justices. The People, citing *People* v. *Bryant* (59 NY2d 786), argue that, the Appellate Division having affirmed, the suppression ruling may not be overturned by us. They argue, alternatively, that the Appellate Division majority was correct on the law. We disagree on both points and, therefore, reverse.

II

A.

As hereafter developed, the test is not whether the detectives in fact intended to interrogate defendant but whether an objective observer would conclude that the conduct of the detectives was reasonably likely to elicit a response from defendant. There being no dispute as to the facts and there being no other inference that could be drawn from the undisputed facts than that the police should have known that defendant was reasonably likely to respond to the placing of the furs before him by making a statement, the issue, unlike that in *Bryant, supra,* is not beyond our reach.[2]

2. *Bryant* involved a question addressed by one officer to another, overheard by defendant and to which he responded. Upon that scenario "reasonable minds may differ as to the inference to be drawn from the established facts" (*People* v *McRay*, 51 NY2d 594, 601; accord: *People* v *Harrison*, 57 NY2d 470, 477). Here, as is more fully discussed below, no other inference can be drawn from the undisputed facts than that defendant was likely to respond by making a statement.

B.

Miranda v *Arizano* (384 US 436) requires not only that before interrogation can begin a suspect must be advised concerning his right to remain silent and of his right to counsel, but also that, "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease" (*id.*, 473-474). Moreover, the rule being designed to counteract the coercive pressure of the custodial setting, a suspect's right to remain silent, once invoked, must be "scrupulously honored" (*id.*, 479; *Michigan* v *Moseley*, 423 US 96, 103-104; *People* v *Wander*, 47 NY2d 724, 725; see *People* v *Grant*, 45 NY2d 366, 373, 376). He may not within a short period thereafter and without a fresh set of warnings be importuned to speak about the same suspected crime (*People* v *Gary*, 31 NY2d 68, 70; *Michigan* v *Moseley*, 423 US 96, 106, *supra*; see *People* v *Buxton*, 44 NY2d 33, 37), but a statement volunteered[3] or spontaneously made will not be suppressible unless it is about the same crime and results from express questioning or its functional equivalent under circumstances which do not include fresh warnings and do not scrupulously honor the suspect's right to cut off questioning (*Rhode Island* v *Innis*, 446 US 290, 300-301; *Michigan* v *Moseley*, *supra*; *People* v *Bryant*, 59 NY2d 786, *supra*).

As the *Innis* case makes clear, "the term 'interrogation' under *Miranda* refers not only to express questioning but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an

3. Voluntariness—waiver in traditional terms—is to be distinguished (*People* v *Grant*, 45 NY2d 366, 374, *supra*). A statement may in fact be wholly voluntary and yet inadmissible because the police action after the suspect cut off questioning did not comply with required procedures (*id*; *Michigan* v *Moseley*, 423 US at 100, *supra*; *Michigan* v *Tucker*, 417 US 433, 443).

incriminating response" (446 US at 301). But, because "[t]he latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police" (*id.*), the question is not what was the subjective intent of the police but rather what words or actions, in light of their knowledge concerning the suspect, they "*should have known* were reasonably likely to elicit an incriminating response" (*id.* at 302 [italics in original]; White, Interrogation Without Questions: *Rhode Island* v *Innis* and *United States* v *Henry*, 78 Mich L Rev 1209, 1231-1236; Kamisar, Brewer v Williams, Massiah *and* Miranda: *What Is "Interrogation"? When Does It Matter?*, 67 Geo LJ 1, 19, n 115 [reprinted in Kamisar, Police Interrogations and Confessions: Essays in Law and Policy, 156-158, n 21]; McCormick, Evidence, 330).

In the context of the foregoing rule, defendant's statements to Cassi must be suppressed. After the original *Miranda* warnings, defendant declined to answer questions. Although he thereafter asked to speak to a district attorney, he abandoned that attempt when told that he first had to reveal to Hudson what he wanted to talk about. With the knowledge from defendant's request to speak to a district attorney that defendant had something on his mind that he wanted to talk about but would not reveal to him, Hudson, instead of acceding to defendant's request that a district attorney be called in, left and within a relatively short time returned with decedent's furs, which were placed directly in front of defendant without any words being spoken. The immediate result was defendant's further request to speak with a district attorney, followed, in one continuous conversation, by his request for an Italian detective and his conversation with Cassi. Neither before the placing of the furs nor before Cassi's conversation with defendant were fresh *Miranda* warnings given, although

here, unlike the situation in *People* v *Bryant, supra,* there was both time enough to do so and clear reason, in light of the prior refusal to speak, for doing so.

On those undisputed facts, objectively considered, no other conclusion is possible than that, in causing the decedent's furs to be placed where defendant could not help but see them, Hudson should have known, in light of defendant's prior request to speak to a district attorney, that doing so was reasonably likely to elicit from defendant an incriminating response. Where, as here, and as in *Coombs* v *Wingo* (465 F2d 96, 99) and *United States* v *Barnes* (432 F2d 89, 91), the only possible object of the police action in revealing evidence to a defendant is to elicit a statement from him, it does no violence to logic to conclude that the police should have known that it would do so (see McCormick, Evidence, *supra*). Bearing in mind the placing of the furs before Ferro, the absence of further warnings to him and the relatively short time elapsed between his refusal to answer questions and the placing of the furs, we conclude that Ferro's right to cut off questioning was not scrupulously honored.[4]

We have considered defendant's other arguments for reversal and find them to be without merit.

For the foregoing reasons, the order of the Appellate Division should be reversed, defendant's motion to suppress his statements made subsequent to his viewing of the furs granted and a new trial ordered.

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4. The string of adjectives in the last paragraph of the dissent and of synonyms in the second paragraph on its page 2 overlooks the meaning of "scrupulous," which is "correct to the smallest detail; punctiliously exact; painstaking, precise" (Webster's Third New International Dictionary, p 2043). As Kamisar puts it, "If the police conduct is designed and likely to pressure or persuade * * * a suspect to incriminate himself * * * then that conduct is compulsion as *Miranda* defines the self-incrimination clause" (*op cit* 67 Geo LJ at 23). The dissent's interpretation of *Innis* implies that the Supreme Court did not mean what it held in that case. We should not indulge in such speculation, particularly since *Innis* was decided but a few years ago.

JASEN, J. (dissenting):

The majority, inholding that the "placing in front of the cell in which defendant was being detained furs stolen from the murder victim's residence constituted interrogation", interprets the "likely to elicit" test (see *Rhode Island* v *Innis,* 446 US 291, 303) too literally and mechanically, untempered by the purposes to be served thereby. Moreover, the majority fails to distinguish between the differing policies involved and the ramifications resulting where the suspect has sought the assistance of counsel—which defendant did not do here—as opposed to merely choosing initially to remain silent. (Cf, *Brewer* v *Williams,* 430 US 387, 397.) The proscriptions to be applied in each instance are not the same.

Because I strongly believe that the mere placing of evidence in front of defendant cannot be deemed an unconstitutional interrogation in violation of the right to remain silent, invoked upon the reading of *Miranda* warnings, I respectfully dissent.

After *Miranda* warnings were given and defendant chose not to answer questions, the police refrained from further discussion with him. Defendant was not subjected to any questioning. He was not subjected to any browbeating, violence, threats or intimidation; no taunting, importuning, harassment or cajoling; no promises, inducement, deceit or trickery; no discomfort, humiliation, exhaustion or moral or religious suasion; nor, indeed, to any other form of compulsion or coercion .(See *Miranda* v *Arizona,* 384 US 436, 448-458; cf, *Oregon* v *Bradshaw,* 77 LEd 2d 405, 413; *Rhode Island* v *Innis, supra,* at p 299.) Rather, upon viewing the

stolen goods obtained from his accomplice and simply placed before him by the police, defendant insisted that he be permitted to speak in exchange for prosecutorial leniency. When informed that nothing could be promised, but that his explanation would be relayed to the District Attorney, defendant volunteered his alibi which was the subject of the suppression motion here in issue. Under these circumstances, I would hold that this police conduct did not constitute an impermissible interrogation.

The constitutional privilege against compulsory self-incrimination does not bar mere self-incrimination. It prohibits only that which is genuinely compelled—i.e., the result of coercion or overbearing of the will of the accused. (*New York* v *Quarles,* 52 USLW 4790, 4792; *United States* v *Washington,* 431 US 181, 187-188; *Michigan* v *Tucker,* 417 US 433, 448.) Statements voluntarily made, regardless of how damning, are not proscribed. (*United States* v *Washington, supra,* at p 187; see also, *Miranda* v *Arizona, supra,* at p 478.) Defendant does not claim, nor is there any indication in the record, that he was actually compelled by police conduct which in any way overcame his will to resist.

Moreover, the "likely to elicit" test invoked by the majority is not an explicit constitutional prescription mandating blind application in every case, regardless of the resulting absurdity under particular facts. (Cf, *North Carolina* v *Butler,* 441 US 369, 374-379; *Michigan* v *Mosley,* 423 US 96, 102-103.) Rather, it is an interpretive guideline to assist in determining whether certain police activity is the "functional equivalent of an interrogation". (*Rhode Island* v *Innis, supra,* at p 302; see also, *Brewer* v *Williams, supra,* at p 399.) In turn, this latter formulation is itself a practical tool for applying the safeguards of *Miranda,*

which themselves are not mandated by the Constitution either. (*Michigan* v *Tucker, supra,* at p 444; *Miranda* v *Arizona, supra,* at p 467.) Rather, even they are "prophylactic" (*New York* v *Quarles, supra,* at p 4792)—i.e., "suggested" "measures to insure that the right against compulsory self-incrimination was protected." (*Michigan* v *Tucker, supra,* at p 444; see *New York* v *Quarles, supra,* at p 4792.)

Ultimately, then, it is this right against compulsory self-incrimination, and not simply some felicitous tests uninformed by their policy purposes, which underlies *Miranda* and its progeny. It is that right which is at issue here and which should guide this court's decision. In considering the facts in this case, "[c]ertainly no one could contend that the interrogation faced by defendant [—if it could reasonably be labelled a such—] bore any resemblance to the historical practices at which the right against compulsory self-incrimination was aimed." (*Michigan* v *Tucker, supra,* at p 444.)

While non-interrogatory statements of police officers and even their non-verbal actions may in some instances amount to unlawful interrogation of a suspect within the meaning of *Miranda* (see *Rhode Island* v *Innis, supra,* at p 299), nevertheless, not all "prompting" of any kind is constitutionally proscribed. (*Id; Edwards* v *Arizona,* 451 US 477, 488 [Burger, Ch.J., concurring].) Thus, while the skillful employment of religious compulsion (*Brewer* v *Williams, supra*) and deceitful confidences (*United States* v *Henry,* 447 US 264) have been held to be impermissible "deliberate elicitations" (*id,* at p 270), the discussion of child-safety concerns in a suspect's presence (*Rhode Island* v *Innis, supra*) and the advisement of the accused of addi-

tional charges being brought against him (*Michigan* v *Mosley, supra*) have been upheld.

Indeed, there is no rigid rule constituting "a blanket prohibition against the taking of *voluntary* statements or a permanent immunity from further interrogation, regardless of the circumstances, [for that] would transform the *Miranda* safeguards into wholly irrational obstacles to ligitimate police investigative activity, and deprive suspects of an opportunity to make *informed and intelligent* assesments of their interests." (*Id,* at p 102 [emphasis added].) Where, for example, as here, there is a mere disclosure of information to a suspect bearing on his prior decision to remain silent—i.e., the government's retrieving of the stolen goods—there is nothing in the Federal or State Constitution or case law barring that suspect from making an informed and voluntary reassessment of his decision and, thereafter, choosing to make a statement. (*Id,* at p 102; see also, *id,* at pp 109-111 [White, J., concurring].)

To construe the mere placing of evidence before defendant—little more than a simple disclosure of information which might, in fact, contribute to an intelligent exercise of his judgment—as an impermissible interrogation is to attribute to that police conduct the qualities of coercion and overbearing of defendant's will which it certainly was not. Such a construction, in my view, gives a tortured and unintended interpretation to the *Miranda* safeguards and the underlying privilege against compulsory self-incrimination. Indeed, in numerous cases involving analogous police conduct under circumstances similar to those presented here, Federal appellate courts have refused to regard the police actions as interrogations in violation of asserted *Miranda* rights. (See, for example, the following, all of

which were decided *subsequent* to the United States Supreme Court's definition of "interrogation" in *Innis*: *United States* v *Guido,* 704 F2d 675 [2d Cir]—suggestion that defendant cooperate initiated by government agents, not impermissible interrogation; *United States* v *Criswell,* 696 F2d 636 [8th Cir]—placing defendant in an office where persuasive photographs were displayed, not impermissible interrogation; *United States* v *Thierman,* 678 F2d 1331 [9th Cir]—conversation in defendant's presence about the likelihood that the investigation would involve his family and girlfriend, not impermissible interrogation; *United States* v *Hackley* (636 Fd2 493 [D.C. Cir]—explanation of the incriminating evidence against defendant, not impermissible interrogation.) (See also, the following which, although decided prior to *Innis,* have since been sited with approval in the aforecited cases: *United States* v *Hart,* 619 F2d 325 [4th Cir]—informing defendant that his cooperation would be relayed to the United States Attorney, not impermissible interrogation; *United States* v *Wilson,* 571 F2d 455 [9th Cir]—informing defendant of the extensive evidence against him, not impermissible interrogation; *United States* v *Davis,* 527 F2d 1110 [9th Cir], cert den 425 US 953—showing defendant a photograph of himself participating in a bank robbery, not impermissible interrogation; *United States* v *Boston,* 508 F2d 1171 [2d Cir], cert den 421 US 1001—confronting defendant with the incriminating results of the search of his apartment, not impermissible interrogation; *United States* v *Hodge,* 487 F2d 945 [5thCir]—explanation of the incriminating evidence against defendant not impermissible interrogation.) In accord with these decisions, and mindful of the purposes to be served and evils to be prevented by the *Miranda* safeguards and the privilege

against compulsory self-incrimination, I believe that the police conduct in this case cannot fairly be deemed a proscribed interrogation.

Finally, the majority's rigid application of the "likely to elicit" test ignores the significant distinctions between the right to remain silent and the right to assistance of counsel—only the former of which did defendant choose to exercise. Although he was advised fully in accordance with *Miranda,* defendant did not ask for counsel, invoke the right thereto, nor in any form indicate that he was awaiting counsel's arrival or assistance. In fact, he repeatedly requested to speak with the District Attorney despite the absence of an attorney.

Defendant simply exercised his right to remain silent upon receiving the *Miranda* warnings, thereby foreclosing any further questioning until such time as he should voluntarily and freely decide otherwise. Whereas "additional safeguards are necessary when the accused asks for counsel" and, therefore, "interrogation [must] cease until an attorney [is] present" (*Edwards* v *Arizona, supra,* at pp 484, 485), that is true *"only if the individual* [*has*] *stated that he wanted counsel"* (*id,* at p 485 [emphasis added].) (See also, *People* v *Cunningham,* 49 NY2d 203; *People* v *Grant,* 45 NY2d 366.) Otherwise, "the accused may *himself* validly waive his rights and respond to interrogation." (*Edwards* v *Arizona, supra,* at p 484 [emphasis added].)

The "policies underlying the two constitutional protections [right to assistance of counsel and privilege against compulsory self-incrimination] are quite distinct" (*Rhode Island* v *Innis, supra,* at p 300, n.4) and, consequently, so, too, are the appropriate procedural safeguards. With regard to the right to counsel, "[i]f the individual states

that he wants an attorney, the interrogation must cease *until an attorney is present.*" (*Miranda* v *Arizona, supra,* at p 474 [emphasis added].) However, where an individual simply indicates his desire to remain silent, the situation is different. There is no "per se proscription of indefinite duration upon any further questioning." (*Michigan* v *Mosley, supra,* at 102; see also, *People* v *Cunningham, supra,* at p 375.) Rather, as long as the individual's "right to *cut off* questioning" is "scrupulously honored" (*Miranda* v *Arizona, supra,* at pp 474, 479 [emphasis added]), he may at any time make an "informed and intelligent" reasssesment of his interests and permit questioning to resume. (*Michigan* v *Mosley, supra,* at pp 102, 104.)

In deciding that the entirely innocuous, non-verbal and non-coercive police conduct in this case amounted to unconstitutional interrogation by mechanically applying the "likely to elicit" test, the majority fails utterly to distinguish "between the procedural safeguards triggered by a request to remain silent and a request for an attorney." (*Michigan* v *Mosley, supra,* at p 104, n.10, explaining *Miranda* v *Arizona, supra,* at p 474.) That distinction was made clear in *Miranda* and has been repeatedly recognized in its progeny. (See e.g., *Oregon* v *Bradshaw,* 77 L Ed 405, 411 [Rehnquist, J., opinion of the Court], 416 [Powell, J., concurring], 417 [Marshall, J., dissenting]; *Edwards* v *Arizona,* 451 US 477, *supra,* at pp 484-485 [White, J., opinion of the Court], 491, n.1 [Powell, J., concurring]; *United States* v *Henry,* 447 US 264, 272-273 [Burger, Ch.J., opinion of the Court], 282 n.6 [Blackmun, J., dissenting], 295-296 [Rehnquist, J., dissenting]; *Rhode Island* v *Innis,* 446 US 291, *supra,* at p 300, n.4 [Stewart, J., opinion of the Court]; *Brewer* v *Williams,* 430 US 387, *supra,* at pp 397-398 [Stew-

art, J., opinion of the Court], 424-426 [Burger, Ch.J., dissenting], 436-437, n.6 [White, J., dissenting]; *Michigan* v *Mosley*, 423 US 96, 101-104, and nn.7 and 10 [Stewart, J., opinion of the Court], 109-110 [White, J., concurring].) Likewise, this court has acknowledged the same distinction. (See *People* v *Grant*, *supra*, at p 375; *People* v *Cunningham*, *supra*, at p 207.)

Here, the defendant expressed no view nor gave the slightest indication that he was incompetent to decide whether to permit a resumption of questioning without legal advice. (Cf, *Michigan* v *Mosley*, *supra*, at p 110, n.2 [White, J., concurring].) Rather, he simply asserted his desire not to speak with the police at the outset, and, subsequently, decided, without any coercion of any sort, to change his mind in light of the incriminating evidence placed before him. In my view, the prophylactic safeguards of *Miranda* and its progeny do not preclude an individual from thus making an informed and voluntary reassessment of his interests, and do not proscribe, as an impermissible interrogation, the kind of non-verbal, non-coercive, non-threatening, and even non-bothersome police conduct at issue in this case.

Accordingly, I would affirm the refusal of both courts below to suppress the statements volunteered by defendant.

* * *

Order reversed, defendant's motion to suppress his statements made subsequent to his viewing of the furs granted and a new trial ordered. Opinion by Judge Meyer in which Chief Judge Cooke and Judges Jones, Simons and Kaye concur. Judge Jasen dissents and votes to affirm in an opinion. Judge Wachtler took no part.

Decided October 25, 1984

(2)

84-1007

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ALEXANDER L. STEVAS,
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No.

In The Supreme Court of the United States

October Term, 1984

STATE OF NEW YORK,

Petitioner,

vs.

ALFIO FERRO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. Whether the placement of the furs in front of the respondent's cell was the functional equivalent of illegal questioning thereby violating the Constitution.

2. Whether a fresh set of Miranda Warnings must be given when questioning resumes assuming, arguendo, that all questioning must not permanently cease once the respondent has exercised his right to counsel.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

STATE OF NEW YORK

Petitioner,

-against-

ALFIO FERRO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Statement of Facts

Lillian Sher was murdered on December 5, 1975 in the course of a robbery. One week later respondent was arrested for causing the death. Respondent had no obvious connection to Sher and there was no direct evidence linking respondent to the crime. Respondent was taken to the 106th Precinct in Queens County and was read his Miranda Warnings. Respondent refused to speak to Detective Robert Hudson, who was assigned to the Sher investigation. Later in the day, respondent stated he wanted to speak to the District Attorney. The detective asked why and respondent resumed his silence. Detective Hudson left the 106th Precinct and returned with a handful of furs he had recovered. The furs were placed a foot from the cell where they remained for some period of time. Respondent then asked if there was a District Attorney who could do something for him. Approximately fifteen minutes later, after being told that neither he nor the

District Attorney could do anything for him, he asked to speak with a "Pisano". Detective Walter Cassi was brought before respondent; "I am Italian, do you want to say something." Respondent continued with a discusssion he had with Sher's neighbor, Florence Freeman, saying she wanted her robbed. Respondent said he was not interested and Freeman asked if he could get somebody. According to respondent, he said he would think about it. Subsequently, these statements were used against him at trial.

A motion to supress the statement made after respondent's viewing of the furs was denied and respondent was convicted of Murder in the Second Degree and was sentenced to a term of imprisonment of 15 years to life.

On appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, by respondent, the lower Court's decision was affirmed, with opinion, by a 3 to 2 decision. Respondent subsequently appealed to the Court of Appeals of the State of New York and the Appellate Division, Second Judicial Department was reversed by a 5 to 1 decision and the motion to supress granted.

POINT ONE

RESPONDENT'S CONSTITUTIONAL RIGHT SECURED BY THE FIFTH AMENDMENT WAS VIOLATED BY THE USE OF A STATEMENT MADE BY HIM TO LAW ENFORCEMENT OFFICERS.

Respondent had been given his Miranda Warnings by Detective Hudson and respondent chose and elected to exercise his constitutional privilege to remain silent. The furs were intentially put in front of his cell admittedly to intimidate and provoke respondent into making a statement. A frightened and coerced respondent then, and only then, asked to talk to an Italian Detective. He was brought before the Detective hours after being given his original Miranda Warnings and then was interrogated without being given new warnings. "Admissibly all statements obtained after the person in custody has decided to remain silent depends, under Miranda, whether his right to cut off questioning was scrupulously honored." *Michigan v. Mosely,* 423 U.S. 96 (1979). In the case at bar, it can hardly be said that the request of respondent was scrupulously honored, instead, psychological ploys were illegally used to improperly induce the defendant's statement. Detective Hudson did not adhere to respondent's request, but used pressure and psychlogical coercion to get him to waive his Fifth Amendment right to counsel which he already had indicated. *People v. Puch,* 70 A.D. 2d 644 (2nd Dept., 1979).

The warnings required under *Miranda v. Arizona,* 384 U.S. 436 (1966), are "an asolute prerequisite to interrogation." As pointed out in *Rhode Island v. Innis,*

446 U.S. 291 (1980):

> "The term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

Placing the furs in front of the cell clearly demonstrates an act of coercion by the detective to induce the respondent to waive his constitutional rights. These maneuvers are nothing short of the "functional equivalent" of illegal questioning which the Supreme Court interpreted as applicable to *Miranda (Supra,* p. 301).

Encircled in the functional equivalent of questioning are "any remarks, psychological tactics or patient maneuvering designed to elicit a response or to undermine the suspect's will to resist *People v. Faison,* 78 Ill App 3d 911, 913 (1979). In the instant case, there was an obvious violation of the respondent's rights and to allow such interplay of interrogation would "subjugate the individual to the will of his examiner" and thereby undermine the privilege; the privilege against compulsory self-incrimination (384 U.S. at 457). It is obvious these techniques of persuasion used by the police officers can not be permitted to undo the "safeguard" of the Fifth Amendment established in *Miranda.*

There are several cases that are illustrative of the functional equivalent of questioning and found the evidence inadmissible due to the fact that there had been no warnings. In *People v. Bodner,* (75 AD 2d 440) a detective confronted the defendant by talking of the

incapability of his cousin as the arsonist by checking and confirming his alibi. The court held this to be the same as telling the defendant he was guilty and lying. In addition, the disclosing of polygraph results to the suspect in *State v. Godfrey,* (131 N.J. Super 168) and a conversation regarding the death penalty as defendant's fate, (*State v. Emory,* 131 Ariz 493) are encompassed within the functional equivalence of questioning.

The state is not privileged to use psychological coercion to induce a defendant to make a statement *Leyra v. Denno,* 347 U.S. 566 (1954). Once an individual has exercised his rights to remain silent, all express questioning and its functional equivalent must cease (446 U.S. 291). Petitioners use of narrowing the holding of *Innis* is simply applying articulable fact in the place of established law. The functional equivalent of questioning to include psychological ploys has been overwhelmingly upheld. To hold that the placing of the furs in front of the cell was anything other than the functional equivalent of questioning would limit the scope of *Miranda* and "place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda.*" Henceforth, then, it is quite evident that the streamline of cases relied on by the People of the State of New York do not raise a constitutional question at all, but are simply attempting to take another "bite of the apple." This, in essence, would lead to a severe erosion of our fundamental rights and guarantees under the Fifth Amendment, and signal permission to the police to engage in a myriad of tactics in contridiction to the privileges protected and guaranteed by the Fifth Amendment of the Constitution.

POINT TWO

A FRESH SET OF MIRANDA WARNINGS MUST BE GIVEN WHEN QUESTIONING RESUMES ASSUMING, ARGUENDO, THAT ALL QUESTIONING MUST NOT PERMANENTLY CEASE ONCE THE RESPONDENT HAS EXERCISED HIS RIGHT TO COUNSEL.

"...All statements obtained after the person in custody has decided to remain silent depends on whether his right to cut off questioning was scrupulously honored.'" One may not, within a short period of time thereafter, continue his interrogation to overcome his silence without a fresh set of warnings, *Michigan v. Mosley,* 423 U.S. 96 (1979).

By placing the furs in front of respondent's cell as a psychological weapon to persuade respondent to waive his constitutional rights tainted the admission. The least to which respondent was entitled was a new set of Miranda Warnings in order to afford the respondent an opportunity to make a free willed intelligent waiver once Detective Cassi began interrogation. The fact that respondent was taken to an Italian Detective at his own request did not give the latter the privilege to interrogate without fresh Miranda Warnings. In the case at hand, the play of the police could never have produced an intelligent waiver.

A statement volunteered or spontaneously made will not be suppressible unless it is about the same crime and results from express questioning or the functional equivalent under circumstances which do not include fresh warnings and do not scrupulously

honor the suspects right to cut off questioning; *Rhode Island v. Innis*, 446 U.S. 290, 300-301, *Michigan v. Mosley, Supra, People v. Brant*, 59 N.Y. 2d 785). In the case at bar, respondent made no spontaneous declarations to the Detective, but responded to his questions only as a result of the police coercion.

Under the circumstances, respondent's statement was improperly induced and procurred and was correctly suppressed. Within the unequivocal law of *Mosley* the psyhological coercion used to overcome respondent's silence without a fresh set of warnings is plainly erroneous, and constitutionally malignant.

Conclusion

For the foregoing reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,
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